Britania Brands (M) Sdn Bhd v Ketua Pengarah Buruh, Malaysia & Anor

HIGH COURT (JOHOR BAHRU) — SUIT NO (MT-1)25–8 OF 2003
VERNON ONG JC
10 OCTOBER 2008

Administrative Law — Judicial review — Application for — Applicant sought order of certiorari to quash decision of assistant director of labour — Likelihood of bias — 'Real danger of bias' test — Factors considered in determining likelihood of bias — Whether established

Labour Law — Employment — Collective agreement — Age of retirement — Whether continues to apply when there was promotion — Whether retirement age of 55 established

Labour Law — Employment — Termination benefits — Interest — Calculation of — Order to pay interest retrospectively — Whether there was basis for such order — Whether order tainted with illegality — Whether order made was in excess of jurisdiction for violating clear and unambiguous provisions relating thereto — Employment Act 1955 s 69(3A)

Labour Law — Trade union — Collective agreement — Request for adjournment — To obtain legal representation — Whether valid reasons to order adjournment — Whether assistant director of labour properly exercised discretion when refusing adjournment

Labour Law — Trade union — Representation — Right to counsel — Request to obtain legal representation and adjourn matter — Refusal of — Whether refusal justified — Whether the Act or the Regulation excludes right to counsel — Whether common law right of a person to appear through counsel can be restricted or taken away — Whether applicant deprived of right to assistance of counsel — Employment Act 1955 — Employment (Termination and Lay-off Benefits) Regulations 1980

The second respondent commenced employment with the applicant in 1963 as a general worker. In 1985, she was promoted to the position of assistant

supervisor. As a member of the union, the terms of the collective agreement were binding on her. On 25 March 2002, the applicant informed the second respondent of her upcoming retirement on 28 May 2002, the date that she would turn 55. She remained in the employment of the applicant until the said date. Subsequently, the applicant received a summons dated 13 August 2002 from the first respondent notifying them of the second respondent's claim for termination benefits of RM32,959.40. Since, the parties had failed to reach an amicable settlement, the matter, which was fixed for hearing in the previous three occasions, did not proceed for a variety of reasons. It was finally set down for hearing on 12 November 2002. In the meantime, the matter was highlighted in the media and had also attracted the attention of the Minister. On the date of the hearing, the applicant's assistant human resource manager appeared at the labour office and requested for an adjournment so as to engage legal representation. The assistant director of labour in charge however, refused the request and proceeded with the hearing. Upon the conclusion of the hearing, the assistant director of labour had, vide an order dated 15 November 2002, ordered the applicant to pay the second respondent the termination benefits amounting to RM32,959.40 together with interest at the rate of 8% per annum with effect from 14 October 2002 until full settlement. Being dissatisfied with the order, the applicant applied for judicial review to quash the decision of the first respondent. The applicant contended, inter alia, that the first respondent had acted in breach of natural justice and procedural fairness when the assistant director of labour rejected their request for an adjournment in order to appoint a legal representation. They also contended that the first respondent had committed several substantive errors of law and acted without or in excess of his jurisdiction when he ruled that the applicant was liable to pay termination benefits to the second respondent. Further, the order was bad in law because it ordered for the payment of interest at the rate of 8% pa with effect from 14 October 2002, in breach of s 69(3A) of the Employment Act 1955 ('Act').

Held, setting aside the order and directing the matter to be retried before another labour officer:

(1) There is no provision in the Act for legal representation in the conduct of an inquiry. The Employment (Termination and Lay-off Benefits) Regulations 1980 ('Regulations') is also silent on the right to assistance of counsel. By the same token, however, there is also nothing in the Act or the Regulations to exclude legal representation. It has been recognised and accepted by the courts that in the absence of any express provision to the contrary the common law right of a person to appear and be heard through counsel cannot be restricted or taken away (see para 21).

(2) Discretion must be exercised based on sound principles so as not to cause a miscarriage of justice. In the present case, the assistant director of labour had erred when he took the view that the application for an adjournment was made informally; he failed to take into consideration the previous three occasions when the hearing was postponed through no fault of the applicant, and he ignored the reason advanced by the applicant as a right consideration and valid ground for the adjournment. The assistant director of labour had not exercised his discretion correctly when he proceeded with the hearing of the inquiry in the absence of the applicant's counsel. This amounted to a restriction on the common law right of the applicant to appear and be heard through counsel (see para 26).

(3) In the present case the collective agreement was not tendered nor did he tender other evidence to support the contention that the age of retirement of the second respondent was 55. The applicant's contention that the retirement age of 55 years was implied was therefore unsupported and unsubstantiated. In consequence, the second respondent's claim was not precluded by the exception in para (a) in reg 4(1) of the Regulations (see para 32).

(4) According to s 69(3A) the interest payable under s 69 shall be calculated with effect from the thirty-first day from the date of the order until satisfaction. In the present case the date of the order was 15 November 2002 and the thirty-first day would fall on 14 December 2002. Therefore, in accordance with s 69(3A) the interest shall be calculated from 14 December 2002 until the date the order was satisfied. In the circumstances the order herein was in excess of jurisdiction being in clear violation of s 69(3A). The order was therefore tainted with illegality and was a nullity (see para 34).

[Bahasa Malaysia summary

Responden kedua telah mula bekerja dengan pemohon pada tahun 1963 sebagai pekerja am. Pada tahun 1985, dia telah dinaikkan pangkat ke jawatan pembantu penyelia. Sebagai ahli kesatuan sekerja, dia terikat dengan terma-terma perjanjian kolektif. Pada 25 Mac 2002, pemohon telah memaklumkan responden kedua tentang persaraannya pada 28 Mei 2002, tarikh dia mencapai umur 55 tahun. Dia kekal bekerja dengan pemohon sehingga tarikh tersebut. Selepas itu, pemohon telah menerima saman bertarikh 13 Ogos 2002 daripada responden pertama yang memaklumkan mereka tentang tuntutan responden kedua untuk faedah-faedah penamatan berjumlah RM32,959.40. Memandangkan pihak-pihak gagal mencapai penyelesaian secara persahabatan, perkara tersebut yang telah ditetapkan untuk pendengaran tiga kali sebelum ini, tidak diteruskan kerana pelbagai

A sebab. Akhirnya ia telah ditetapkan untuk pendengaran pada 12 November 2002. Sementara itu, perkara tersebut telah diutarakan dalam media dan juga menarik perhatian Menteri. Pada tarikh pendengaran, penolong pengurus sumber manusia pemohon telah hadir di pejabat buruh dan memohon penangguhan untuk melantik wakil di sisi undang-undang. Penolong
B pengarah buruh yang bertugas walau bagaimanapun, menolak permohonan itu dan meneruskan pendengaran. Setelah mendapat kesimpulan pendengaran tersebut penolong pengarah buruh telah, melalui perintah bertarikh 15 November 2002, mengarahkan pemohon membayar responden
C kedua faedah-faedah penamatan berjumlah RM32,959.40 bersama faedah pada kadar 8% setahun mula berkuat kuasa dari 14 Oktober 2002 sehingga penyelesaian penuh. Berasa tidak puas hati dengan perintah tersebut pemohon telah memohon semakan kehakiman untuk membatalkan keputusan responden pertama. Pemohon menegaskan, antara lain, bahawa
D responden pertama telah bertindak melanggar keadilan asasi dan keadilan prosedur di mana penolong pengarah buruh telah menolak permohonan mereka untuk penangguhan bagi tujuan melantik wakil undang-undang. Mereka juga menegaskan bahawa responden pertama telah melakukan beberapa kesilapan undang-undang yang substantif dan bertindak tanpa atau
E melampaui bidang kuasanya apabila beliau memutuskan bahawa pemohon bertanggungjawab membayar faedah-faedah penamatan kepada responden kedua. Tambahan, perintah tersebut tidak sah di sisi undang-undang kerana ia mengarahkan bayaran faedah pada kadar 8% setahun yang mula berkuat kuasa dari 14 Oktober 2002, yang melanggar s 69(3A) Akta Pekerjaan 1955
F ('Akta tersebut').

Diputuskan, mengetepikan perintah dan mengarahkan perkara tersebut dibicarakan semula di hadapan pegawai buruh lain:

G (1) Tiada peruntukan dalam Akta tersebut tentang wakil di sisi undang-undang dalam pelaksanaan suatu siasatan. Peraturan-Peraturan Kerja (Faedah-Faedah Penamatan dan Rentikerja Sentara) 1980 ('Peraturan-Peraturan') juga tidak menyebutkan hak mendapat bantuan
H peguam. Namun begitu, tiada apa-apa dalam Akta tersebut atau Peraturan tersebut yang mengecualikan wakil undang-undang. Adalah diiktiraf dan diterima oleh mahkamah bahawa dalam ketiadaan apa-apa peruntukan nyata yang bertentangan hak *common law* seseorang untuk hadir dan didengar melalui peguam tidak boleh disekat atau dilucutkan
I (lihat perenggan 21).

(2) Budi bicara hendaklah digunakan berdasarkan prinsip-prinsip kukuh agar tidak menyebabkan kesilapan keadilan. Dalam kes ini, penolong pengarah buruh telah terkhilaf semasa beliau mengambil pandangan bahawa permohonan untuk penangguhan dibuat secara tidak formal;

beliau gagal mempertimbangkan tiga pendengaran sebelumnya di mana pendengaran telah ditangguhkan yang bukan disebabkan oleh pemohon, dan beliau tidak mengendahkan sebab yang dikemukakan oleh pemohon sebagai pertimbangan yang wajar dan alasan yang sah untuk penangguhan. Penolong pengarah buruh tidak menggunakan budi bicaranya dengan sewajarnya apabila beliau meneruskan dengan pendengaran siasatan itu tanpa kehadiran peguam pemohon. Ini merupakan sekatan ke atas hak *common law* pemohon untuk hadir dan didengar melalui peguam (lihat perenggan 26).

(3) Dalam kes ini perjanjian kolektif dan keterangan lain tidak ditenderkan pemohon untuk menyokong penegasan bahawa umur persaraan responden kedua adalah 55. Penegasan pemohon bahawa umur persaraan 55 tahun adalah tersirat dan oleh itu tidak disokong dan tidak disahkan. Akibatnya, tuntutan responden kedua tidak dihalang oleh pengecualian dalam perenggan (a) kepada peraturan 4(1) Peraturan-Peraturan (lihat perenggan 32).

(4) Menurut s 69(3A) faedah yang perlu dibayar di bawah s 69 hendaklah dikira bermula dari hari ke-31 dari tarikh perintah tersebut sehingga selesai. Dalam kes ini tarikh perintah tersebut adalah 15 November 2002 dan hari ke-31 jatuh pada 14 Disember 2002. Oleh itu menurut s 69(3A) faedah hendaklah dikira dari 14 Disember 2002 sehingga tarikh perintah tersebut selesai. Dalam keadaan sedemikian perintah tersebut melampaui bidang kuasa kerana jelas melanggar s 69(3A). Perintah tersebut oleh itu dicemari dengan ketidaksahan undang-undang dan adalah terbatal (lihat perenggan 34).]

Notes

For cases on application for judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 191–197.

For cases on collective agreement, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 849–854.

For cases on collective agreement of trade union, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1638–1643.

For cases on termination benefits, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1146–1157.

Cases referred to

Austral Amalgamated Tin Bhd and another appeal v Abdul Wahab bin Kopon & Ors and another appeal [2004] 2 MLJ 193, CA (refd)

Bushell v Secretary of State for the Environment [1981] AC 75, HL (refd)

Colgate Palmolive (M) Sdn Bhd v Yap Kok Fong and another appeal [2001] 4 MLJ 97; [1998] 3 ILR 843; [2001] 2 AMR 2309, CA (refd)

Deputy Chief Police Officer, Perak v Ramesh a/l Thangaraju [2001] 1 MLJ 161, CA (refd)

A *Dunlop Industries Employees Union v Dunlop Malaysian Industries Bhd & Anor* [1987] 2 MLJ 81, SC (refd)

Doresamy v Public Services Commission [1971] 2 MLJ 127, HC (refd)

Esso Production Malaysia Inc v Aladdin bin Mohd Hashim [2000] 3 MLJ 270, CA (refd)

B *Estet Pekebun Kecil Sdn Bhd v Thomas Rajan* [1991] 2 ILR 1028 (refd)

Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers [1983] 1 MLJ 175, FC (refd)

Locabail (UK) Ltd v Bayfield Properties Ltd & Anor [2000] 2 WLR 870, CA (folld)

C *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337, FC (refd)

Michael Lee Fook Wah v Minister of Human Resources, Malaysia & Anor [1998] 1 MLJ 305, CA (refd)

D *Mohamad Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321, FC (folld)

Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah [2004] 2 CLJ 777, FC (not folld)

E *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600, CA (refd)

Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487, HC (refd)

Sime Surveillance Sdn Bhd v Abu Bakar Haji Mahmood (Rayuan Sivil No R2–16–9 Tahun 1999) (refd)

F *Soonfroze Corp Sdn Bhd v Siti Salabiah bte Chek Hassan & Ors* [2003] 5 MLJ 361; [2003] 2 AMR 427, HC (refd)

Syarikat Emastulin Automobil Sdn Bhd v Kathereson a/l Subramaniam [1988] 1 ILR 311 (refd)

G *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, CA (refd)

Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor [2002] 3 MLJ 129, CA (refd)

H **Legislation referred to**

Employment Act 1955 ss 2, 69, 69(3A), 70, 70(d), 70(g), 70(h)

Employment (Termination and Lay-Off Benefits) Regulations 1980 regs 3, 4(1), 4(1)(a)

Evidence Act 1950 s 101

I Rules of the High Court 1980 O 53

Raymond Low (Shearn Delamore & Co) for the plaintiff.

Azizah Nawawi (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.

Vernon Ong JC:

[1] This is an application for judicial review (encl 8) under O 53 of the Rules of the High Court 1980 ('the RHC') for an order of certiorari to quash the decision of the Director General of Labour (first respondent) made on 12 November 2002 pursuant to s 69 of the Employment Act 1955 ('the Act'). Leave for the said application was obtained on 7 October 2003.

BRIEF ACCOUNT OF THE FACTS

[2] The second respondent commenced employment with the applicant on 21 October 1963 as a general worker. No letter of appointment was issued to her. However, the second respondent being a unionised worker came under the terms of the collective agreement. On 1 January 1985 the second respondent was promoted to the position of assistant supervisor. On 25 March 2002 the applicant issued a letter to the second respondent informing of her upcoming retirement on 28 May 2002 being the date when she attains the age of 55 years. The second respondent remained in the employment of the applicant until 28 May 2002.

[3] Subsequently, the applicant received a summons dated 13 August 2002 from the first respondent notifying of a claim by the second respondent for termination benefits of RM32,959.40. On 28 August 2002 the applicant and the second respondent appeared at the first respondent's office for the hearing. A labour officer one Encik Anuar advised both parties to settle the matter amicably and the matter was adjourned to a date to be fixed. By a letter dated 2 September 2002 the first respondent informed the applicant that the matter was fixed for continued hearing on 3 October 2002. On 3 October 2002 the applicant appeared at the labour office but was informed that the hearing had been postponed because the labour officer in charge was attending a course. By a letter dated 15 October 2002 the applicant was informed of the next continued hearing date on 6 November 2002. Owing to the fact that 6 November 2002 was a public holiday the continued hearing was rescheduled to 12 November 2002.

[4] Meanwhile, on 26 October 2002 three Chinese daily newspapers carried reports stating that the second respondent had lodged a complaint with the Malaysian Chinese Association ('MCA') about the applicant's failure to pay her termination benefits. Subsequently on 17 November 2002, a report in a Chinese daily newspaper featured the second respondent together with the Minister of Human Resources and the Member of Parliament for Tambatan, Johor. The Minister was reported to have said that he will assist the second respondent to recover her deserved welfare benefits and that he

agreed to look into the matter and contact the factory and that he is confident that he will be able to settle the matter. That report carried a photograph of the Minister shaking hands with the second respondent in the presence of the MCA representative.

[5] On 12 November 2002 the applicant's assistant human resources manager ('Liew') appeared at the labour office. The assistant director of labour in charge ('ADL') called both parties into his room enquiring about whether a settlement had been reached. After being informed that no settlement had been reached the ADL informed the parties that he would proceed with the hearing of the complaint. Liew then requested for an adjournment in order for the applicant to be obtain legal representation. The ADL rejected the request and proceeded with the hearing. The second respondent was examined on oath. The ADL then directed Liew to give evidence on oath. At the conclusion of the hearing the ADL allowed the second respondent's claim. By a letter to the applicant dated 14 November 2002 the first respondent enclosed a copy of the order dated 15 November 2002 which ordered the applicant pay to the second respondent termination benefits in the sum of RM32,959.40 together with interest at the rate of 8% pa with effect from 14 October 2002 until full settlement.

PRINCIPLES OF JUDICIAL REVIEW

[6] At the outset it is important to note that the remedy of judicial review is not concerned with reviewing the merits of the decision in which the application for judicial review is made. Instead, the remedy of judicial review is concerned principally with a review of the decision making process. In performing this role the court is sitting in its supervisory jurisdiction and not in its appellate jurisdiction (*Michael Lee Fook Wah v Minister of Human Resouces, Malaysia & Anor* [1998] 1 MLJ 305). The court will not interfere with the exercise of any power or discretion which has been conferred on an inferior court, administrative tribunal or other public authority. However, the decision of the body may be quashed by an order of certiorari where: (i) that body has acted without jurisdiction; or (ii) that body has exceeded its jurisdiction; or (iii) body has failed to comply with the rules of natural justice in a case where the rules are applicable; or (iv) there is an error of law on the face of the record or the decision is unreasonable in the *Wednesbury* sense. In short, whether certiorari will lie to quash the decision which has already been made by that body depends not on the decision itself but on whether the decision was made ultra vires, unfairly or unjustly in the exercise of the discretion.

GROUNDS OF APPLICATION

[7] This application is founded on two main grounds:

(a) That the first respondent had acted in breach of natural justice and

procedural fairness when the ADL rejected the applicant's request for an adjournment in order to appoint an advocate to represent the applicant for the purpose of the hearing and proceeded with the hearing on the same day; and

(b) That the first respondent had committed several substantive errors of law and acted without or in excess of his jurisdiction when the ADL ruled that the applicant was liable to pay termination benefits to the second respondent.

[8] The following affidavits were filed in relation to this application:

(1)	The applicant's affidavit affirmed on 5 December 2002.	…(encl 4)
(2)	The applicant's further affidavit affirmed on 7 November 2003.	…(encl 9)
(3)	The respondent's affidavit in reply affirmed on 26 October 2004.	…(encl 14)
(4)	The respondent's affidavit in reply affirmed on 27 October 2004.	…(encl 15)
(5)	The applicant's affidavit in reply affirmed on 4 February 2005.	…(encl 18)

APPLICANT'S SUBMISSION

[9] In regard to the first ground, learned counsel for the applicant submitted that the labour officer conducting the inquiry under s 70 of the Act is a public decision maker exercising quasi-judicial powers under the Act. Therefore he has a duty to act fairly and in accordance with the rules of natural justice and procedural fairness. The outright refusal to grant an adjournment at the hearing of the inquiry constitutes a blatant breach of the rules of natural justice and procedural fairness (*Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175; *Esso Production Malaysia Inc v Aladdin bin Mohd Hashim* [2000] 3 MLJ 270; *Soonfroze Corp Sdn Bhd v Siti Salabiah bte Chek Hassan & Ors* [2003] 5 MLJ 361; [2003] 2 AMR 427). Learned counsel submitted that prior to the hearing of the inquiry on 12 November 2002 there were two earlier meetings, on 28 August 2002 and 3 October 2002 during which attempts at conciliation were made. It is the practice of the labour department to conduct conciliation meetings even though the letters of notification may state that the matter is set down for hearing ('perbicaraan'). The applicant accordingly understood that the purpose of the hearing on 12 November 2002 was to facilitate further conciliation attempts.

[10] Learned counsel submitted that firstly, that was the first time the applicant had applied for an adjournment. Secondly, Liew, the applicant's representative had appeared at the labour office for the purpose of conciliation and not for the hearing. The applicant did not have the opportunity to prepare the bundle of documents or the applicant's submission. The applicant was also denied the opportunity to cross-examine the second respondent effectively with the benefit of counsel (*Bushell v Secretary of State for the Environment* [1981] AC 75). Thirdly, the ADL, conducting the inquiry did not give any reason for his refusal in allowing the applicant to be legally represented.

[11] It was also submitted that during the hearing of the inquiry the ADL remarked that the applicant was practising double standards. Liew, the applicant's representative was also compelled to appear in the witness box to be cross-examined by the ADL himself without affording Liew to be re-examined. The applicant's ability to present its case was thereby restricted (*Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487).

[12] Learned counsel then submitted that there was also a likelihood of bias on the part of the ADL. He referred to the reports in three Chinese daily newspapers. The Labour Department comes under the purview of the Ministry of Human Resources. The Minister had in his affidavit denied that he had actively espoused the second respondent's claim. However, no explanation was given as to why the Minister had attended the meeting and shook hands with the second respondent; nor did the Minister deny the contents of the Chinese daily newspapers.

[13] Learned counsel submitted that in all the aforesaid circumstances the manner in which the inquiry was conducted was tainted with likelihood of bias, breach of natural justice and procedural fairness. The decision dated 12 November 2002 of the ADL a public decision maker is susceptible to challenge where there is a jurisdictional error arising from a breach of natural justice (*Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337).

[14] In regard to the second ground, learned counsel submitted that the decision made on 12 November 2002 is tainted with several material flaws and errors of law. The second respondent's claim for termination benefits come under reg 3 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 ('the Regulations'). The ADL erred in law when he failed to appreciate that the said claim fell within one of the exceptions under reg 4(1)(a) of the Regulations. As a unionised employee the second respondent's retirement age is 55 years as provided for under the collective agreement. The implied term on the retirement age continued to apply when

the second respondent was promoted to assistant supervisor (s 2 of the Employment Act 1955; *Sime Surveillance Sdn Bhd v Abu Bakar Haji Mahmood* (Rayuan Sivil No R2–16–9 Tahun 1999)). The general rule in the Malaysian context is that the retirement age is set at 55 years of age (*Syarikat Emastulin Automobil Sdn Bhd v Kathereson a/l Subramaniam* [1988] 1 ILR 311; *Estet Pekebun Kecil Sdn Bhd v Thomas Rajan* [1991] 2 ILR 1028; *Colgate Palmolive (M) Sdn Bhd v Yap Kok Fong and another appeal* [2001] 4 MLJ 97; [1998] 3 ILR 843; [2001] 2 AMR 2309; *Harvey on Industrial Relations and Employment Law* para 259).

[15] Learned counsel also submitted the said decision made on 12 November 2002 is bad in law because it ordered for the payment of interest at the rate of 8% pa with effect from 14 October 2002. This is in breach of s 69(3A) of the Act which provides that interest payable is to be calculated commencing on the thirty-first day from the date of the making of the order until the order is satisfied. This constitutes a serious jurisdictional error making the said decision a nullity.

THE FIRST RESPONDENT'S SUBMISSION

[16] In reply to the issues under the first ground learned senior federal counsel ('SFC') for the first respondent submitted that there is no right to counsel during the inquiry under s 69 of the Act. The procedure regulating the conduct of the inquiry is stipulated in s 70 of the Act. Section 70 provides that the first respondent shall issue a summons to the applicant: (i) giving notice of the nature of the complaint; and (ii) informing of the date, time and venue at which the applicant may bring any witness. Witnesses summoned shall be examined on oath or affirmation by the first respondent. If the person summoned fails to appear at the inquiry the first respondent may hear and decide the complaint notwithstanding that the person's interest may be prejudiced by the decision (s 70(d), (g) and (h) of the Act). There is nothing in s 70 that requires or entitles the applicant to have access to counsel during the inquiry. Therefore the first respondent cannot be said to have deprived the applicant of procedural fairness by not allowing the applicant's request for an adjournment (*Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah* [2004] 2 CLJ 777).

[17] It was also submitted by SFC that the Act is a social legislation and an inquiry before the first respondent under s 69 is only an inquiry between an employee and his employer. The inquiry is not a court proceeding and should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedures that are applied in a court of law (*Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 MLJ 129; *Austral Amalgamated Tin Bhd and another appeal v Abdul Wahab*

bin Kopon & Ors and another appeal [2004] 2 MLJ 193; *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317). As there is no legal requirement for legal representation before the inquiry, the same cannot be made to be the basis for an application for an adjournment. Accordingly, SFC submitted that the refusal, if any, to grant the adjournment on the ground of access to counsel cannot be the basis to quash the decision made on 12 November 2002. SFC pointed out that the ADL had in his affidavit denied that Liew made a formal application during the inquiry for an adjournment to obtain legal representation. However, the ADL admitted that Liew did say to him that the applicant wanted to engage a counsel.

[18] Assuming that Liew's assertions are true, SFC submitted that the ADL was correct in rejecting the request for an adjournment. In the first place the applicant had no legal right to counsel in the inquiry proceedings. Secondly, to allow the applicant to be represented by counsel would not be fair to the second respondent. Thirdly, the applicant was represented by its assistant manager for human resources and not any ordinary officer. Finally, the objective of the inquiry is meant to be simple, cheap and fast (*Dunlop Industries Employees Union v Dunlop Malaysian Industries Bhd & Anor* [1987] 2 MLJ 81; *Deputy Chief Police Officer, Perak v Ramesh a/l Thangaraju* [2001] 1 MLJ 161). SFC further submitted that according to the notes of proceedings both parties were given the right to be heard and the opportunity to cross-examine the witnesses during the inquiry. Therefore the ADL did not offend the rules of natural justice or procedural fairness in the conduct of the inquiry on 12 November 2002.

[19] In reply to the issue of likelihood of bias on the part of the ADL, SFC submitted that both the ADL and the Minister had denied the applicant's allegation. The applicant had failed to prove that there is a real danger of bias on the part of the ADL. A mere allegation of a likelihood of bias is not enough (*Mohamad Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321).

[20] In regard to the second ground SFC submitted the onus is upon the applicant to prove that the retirement age is 55 years was an implied term (s 101 of the Evidence Act 1950). The ADL found that 'Tiada perjanjian perkhidmatan secara bertulis menggambarkan tidak ada umur persaraan bagi kes pengadu ini. Pihak defendan hanya memberi keterangan melalui saksi bahawa umur persaraan adalah 55 tahun sebagaimana terpakai kepada pekerja-pekerja yang tertakluk kepada perjanjian bersama tetapi tiada bukti dan saksi yang menyokong keterangan saksi ini'. The collective agreement was not produced at the inquiry to confirm that the normal retirement age is 55 years. The applicant cannot assume that all workers know or ought to have known that the retirement age is 55 years. The applicant failed to

substantiate their assertion. SFC submitted that the cases cited by the applicant are distinguishable. In those cases the evidence of both the practice and policy of the employers in question were taken into account. SFC also submitted that in exercising its power of judicial review the courts must be slow in interfering with the finding of fact by the inquiry tribunal (*Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600).

FINDING OF THE COURT

[21] The issues that fall to be determined under the first ground is: (1) whether there is any right to counsel in an inquiry conducted pursuant to s 69; and (2) whether there is a likelihood of bias on the part of the ADL. In regard to the first issue, the applicant's complaint is that their application for an adjournment in order to obtain legal representation was denied outright. Consequently, the applicant's ability to present its case was restricted. There is no provision in the Act for legal representation in the conduct of an inquiry. The Regulations is also silent on the right to assistance of counsel. By the same token, however, there is also nothing in the Act or the Regulations to exclude legal representation. In the circumstances can it be said that the applicant have been deprived of the right to the assistance of counsel? It has been recognised and accepted by the courts that in the absence of any express provision to the contrary the common law right of a person to appear and be heard through counsel cannot be restricted or taken away.

[22] This fundamental principle was enunciated in *Doresamy v Public Services Commission* [1971] 2 MLJ 127. In that case an officer appealed to the appeal board against his dismissal from service by the disciplinary board. The appeal was submitted by a solicitor on his behalf. The appeal board rejected the appeal on the ground that the appeal was not made by him but by his solicitor. The regulation in question was silent on the right to assistance of counsel. The High Court accepted that the common law right of legal representation can be restricted either by express words in a statute or by necessary implication. Raja Azlan Shah J (as His Royal Highness then was) observed at p 129:

> On appeal Deane J held that the common law right to appear and be heard through an agent cannot be restricted in the absence of an expressed provision restricting or taking away that right. The learned judge referred to the case of *R v Assessment Committee of Saint Mary Abbotts, Kensington* in which Charles J had to decide on the question whether a person exercising the statutory right of objecting could appear by an agent: the learned judge quoted a passage of Stirling J in *Jackson & Co v Napper*:
>
> > I understand the law to be that, in order to make out that a right conferred by statute is to be exercised personally, and not by an agent, you must find something in the Act, either by way of express enactment or necessary

implication, which limits the common law right of any person who is sui juris to appoint an agent to act on his behalf. Of course, the Legislature may do so; but prima facie where there is nothing said about it, a person has the same right of appointing an agent for the purpose of exercising a statutory right as for any other purpose.

[23] And at p 130:

> Now this question must be posed: if he has a statutory right of appeal why cannot his solicitor appear on his behalf? The regulation is silent on the right to the assistance of counsel. Is that adequate to deprive the aggrieved person of the right to the assistance of counsel? I think not. The considerations requiring assistance of counsel in the ordinary courts are just as persuasive in proceedings before disciplinary tribunals. This is especially so when a person's reputation and livelihood are in jeopardy. If the ideal of equality before the law is to be meaningful, every aggrieved person must be accorded the fullest opportunity to defend himself at the appellate review stage. Where he has a statutory right of appeal and the regulations are silent on the right to the assistance of counsel, he cannot be deprived of such right of assistance. I can find nothing from reg 13(1) to limit his right.

[24] The application for an adjournment was made because the applicant wanted to be represented by counsel. That the application for an adjournment was in fact made is cannot be denied given the ADL's admission in the ADL's affidavit (para 9 in encl 15) as follows:

> 9 Seterusnya, bagi menjawab pengataan di perenggan 27, 28 dan 29 afidavit pemohon, saya ingin menegaskan bahawa semasa di dalam kamar/bilik pegawai, *wakil pemohon ada menyuarakan pandangan beliau untuk melantik peguam bagi mewakili pemohon*. Saya telah memaklumkan bahawa kes ini telah ditetapkan untuk perbicaraan dan beliau sepatutnya melantik peguam sebelum tarikh perbicaraan. Justeru itu, perkara ini tidak direkodkan dalam nota keterangan kerana perkara ini merupakan sebahagian daripada tidak rasmi dalam kamar/bilik pegawai.
>
> (Emphasis added.)

[25] The question then is whether the ADL had correctly exercised his discretion in refusing to grant an adjournment sought by the applicant. At the first hearing on 28 February 2002 the parties were advised to resolve the matter amicably. The second hearing on 3 October 2002 was adjourned because the ADL was away on course. The third hearing on 6 November 2002 was also adjourned because it fell on a public holiday. The hearing subsequently proceeded on 12 November 2002. On the facts it is plain that the hearing on 12 November 2002 was effectively the first time the hearing of the inquiry was set down. On the previous three occasions the hearing did

not proceed for a variety of reasons. There was only one application for an adjournment and it was made on the first hearing date. A

[26] The general principles relating to the postponement of cases has been enunciated comprehensively in *Soonfroze Corp Sdn Bhd v Siti Salabiah bte Chek Hassan & Ors* [2003] 5 MLJ 361; [2003] 2 AMR 427. It is in the absolute discretion of the court or tribunal to decide whether to grant an application for the postponement of a case already set down for hearing. All cases fixed for hearing should proceed with all convenient speed and without having to be adjourned on flimsy grounds. However, if there is an application for adjournment, the court must look at the material facts and grounds of the application in order to exercise its discretion correctly. A refusal to grant an adjournment can constitute a failure to give a party the opportunity of adequately presenting his case. Discretion must be exercised based on sound principles so as not to cause a miscarriage of justice. In the present case the ADL had erred when: (1) he took the view that the application for an adjournment was made informally; (2) he failed to take into consideration the previous three occasions when the hearing was postponed through no fault of the applicant; and (3) he ignored the reason advanced by the applicant as a right consideration and valid ground for the adjournment. The ADL had not exercised his discretion correctly when he proceeded with the hearing of the inquiry in the absence of the applicant's counsel; this amounted to a restriction on the common law right of the applicant to appear and be heard through counsel. For this reason the order of the ADL cannot stand. B C D E F

[27] In *Nordin Hj Zakaria* the respondent a police officer was dismissed from the Royal Malaysia Police after he was found guilty pursuant to disciplinary proceedings initiated by the Deputy Chief Police Officer, Kelantan ('DCPO'). His suit at the High Court against the DCPO was dismissed. On appeal the Court of Appeal held that there was procedural unfairness in the disciplinary proceedings chiefly because the DCPO did not inform the police officer, before the commencement of the proceedings that he could be punished with dismissal or a reduction in rank if he were to be found guilty. One of the issues of law before the Federal Court was whether the disciplinary authority is required to inform a junior officer of the possible consequences on a finding of guilty. The Federal Court held that the respondent could not be said to have been deprived of procedural fairness by not being informed as there is nothing in the regulations in question that requires or entitles the respondent to be informed. As *Nordin Hj Zakaria* deals with the question of whether a public servant facing dismissal should have a right to be informed of the possible consequences prior to the hearing of the disciplinary proceedings it is inapplicable to the present case. Accordingly, this case is of no aid to the first respondent's contention that the G H I

first respondent cannot be said to have deprived the applicant of procedural fairness by not allowing the applicant's request for an adjournment.

[28] The second issue relates to whether there is a likelihood of bias on the part of the ADL. The rest to be applied in determining whether there is a likelihood of bias is the 'real danger of bias' test as propounded by the Federal Court in *Mohamad Ezam bin Mohd Nor*. Mohamed Dzaiddin Chief Justice delivering the judgment of the Federal Court said at p 325:

> Having considered the authorities cited and their reasonings, we would follow *Gough* which is that the test to be applied in the present case is the 'real danger of bias' test. Hence, the question here is whether having regard to the facts and circumstances, was there a real danger of bias on the part of the learned trial judge when he heard the habeas corpus application involving the appellants?

[29] At p 324 the real danger test is described in the following manner:

> In England, the courts applied the 'real danger' of bias test in a criminal case. In *R v Gough* [1993] AC 646, the House of Lords rejected the reasonable suspicion test. Lord Goff, after examining the authorities in detail, reformulated the real danger test as follows (at p 670):
>
> > [Having] ascertained the relevant circumstances, the court should ask itself whether, having regard to the circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, *in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration*.
> >
> > (Emphasis added.)

[30] Whether there was a real danger of bias or not will depend upon the facts which may include the nature of the issue to be decided. Every application must be decided on the facts and circumstances of each individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be. Recognising that it would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias the Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor* [2000] 2 WLR 870 set out at p 888 a number of instances in which a real danger of bias might well be thought to arise:

> By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility

of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v Kelly* (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him.

[31] Applying the observations set out in the authorities cited above to the present case the two factors alleged by the applicant to give rise to a real danger of bias are: (i) in the course of the hearing the ADL remarked that the applicant is practising double standards; and (ii) the reports in the Chinese daily newspapers. Firstly, the ADL has categorically denied making the alleged remarks. He said that he decided the matter on the basis of the facts adduced. In this regard the mere fact that the ADL had commented adversely on the applicant would not without more found a sustainable objection. The views expressed by the ADL were not in the circumstances, in such extreme or unbalanced terms as to throw doubt on his ability to try the issue objectively. Secondly, the reports in the Chinese daily newspapers on 26 October 2002 merely highlighted the second respondent's plight. The report on 17 November 2002 featuring the Minister and the second respondent was published after the date of the decision. These factors are tenuous because the reports are all in Chinese and there is nothing to show that the ADL could read Chinese or was aware of the reports. Secondly, the factor that the ADL comes under the purview of the Minister is also groundless as the report featuring the Minister and the second respondent came out only after the decision of the ADL was made five days earlier. In the circumstances it could not be said that owing to the said reports the ADL might have unfairly regarded with disfavour the applicant's case. The court is not convinced that there is any likelihood of bias on the part of the ADL.

[32] The second ground is founded upon the premise that the first respondent had committed several substantive errors of law and acted without or in excess of his jurisdiction. The two pertinent issues are: (1) whether there was an implied term that the retirement age is 55 years and if so, whether the second respondent's claim falls within the exception in para (a) in reg 4(1) of the Regulations; (2) whether the order dated 15 November 2002 requiring payment of interest at the rate of 8% pa with effect from 14 October 2002 is in breach of s 69(3A). The applicant's contention is that the implied term on the retirement age continued to apply when the second respondent was promoted. Further it was contended that the general rule in the Malaysian context is that the retirement age is 55 years. In *Sime*

A *Surveillance* there was evidence before the court of the practice and policy of the employer to retire employees at the age of 60 years. In *Syarikat Emastulin Automobil*, supra there was also direct evidence of the policies on the retirement age. In *Estet Pekebun Kecil Sdn Bhd* the court's finding on the retirement age was based on the documentary evidence. And in *Colgate*
B *Palmolive (M) Sdn Bhd* the court's finding was based on the collective agreement and the human resources department personnel procedures and guidelines which were tendered in court. The aforesaid cases are distinguishable on the facts. In the present case the collective agreement was not tendered and no other evidence whatsoever was tendered by the
C applicant; there was only Liew's bare assertion. The applicant's contention that the retirement age of 55 years is implied is therefore unsupported and unsubstantiated. In consequence, the second respondent's claim is not precluded by the exception in para (a) in reg 4(1).

D **[33]** The second issue relates to the validity of the order requiring payment of interest calculated from 14 October 2002 until satisfaction. The applicant contended that in making the order to pay interest retrospectively from 14 October 2002 (one month before the date of the decision dated 15 November 2002) the ADL committed an error of law. The applicable law
E in question is s 69(3A) which reads as follows:

> (3A) An order made by the Director General for the payment of money under this section shall carry interest at the rate of 8 per centum per annum, or at such other rate not exceeding 8 per centum per annum as the Director General may direct,
F the interest to be calculated commencing on the thirty-first day from the day of the making of the order until the day of the order is satisfied:
>
> Provided that the Director General, on an application by an employer made within 30 days from the date of the making of the order, if he is satisfied that special circumstances exist, may determine any other date from which the
G interest is to be calculated.

[34] According to s 69(3A) the interest payable under s 69 shall be calculated with effect from the thirty-first day from the date of the order until
H satisfaction. In the present case the date of the order is 15 November 2002 and the thirty-first day would fall on 14 December 2002. Therefore, in accordance with s 69(3A) the interest shall be calculated from 14 December 2002 until the date the order is satisfied. However, the order of the ADL dated 15 November 2002 states that '... faedah atas kadar 8% setahun
I hendaklah dikenakan ke atas semua bayaran tertunggak dan faedah itu *dikira mulai 14 Oktober 2002* sehingga penyelesaian penuh'. There was no submission in reply by SFC on this issue. In his affidavit in reply, however, the ADL stated that the date '14 Oktober 2002' is a typing error and that the correct date is the date of the decision. Even if the commencement date is the

date of the decision (15 December 2002) it would taint the order with illegality because in accordance with s 69(3A), the commencement date shall fall on 14 December 2002. Consequently, the ADL's assertion that the correct date is the date of the decision runs foul of s 69(3A). Furthermore, there was no evidence that the first respondent had taken any steps to rectify the error. There is no evidence of a revised or amended order being issued in place of the defective order. Indeed, the order exhibited by the first respondent vide exh YH-1 is the same order with the commencement date stated as '14 Oktober 2002'. An order made under s 69 must comply with the clear statutory provisions relating thereto. Section 69(3A) is clear and unambiguous as to when the calculation of the interest shall be computed. In the circumstances the order is in excess of jurisdiction being in clear violation of s 69(3A). The order is therefore tainted with illegality and is a nullity.

[35] In summing up, it is the finding of the court that the applicant has the common law right to appear and be heard through counsel at the hearing of the inquiry. The ADL had wrongly exercised his discretion in refusing to grant an adjournment and in so doing had also thereby restricted the applicant's common law right to present its case through counsel. For that reason the ADL's order cannot stand. In addition, the ADL's order dated 15 November 2002 prescribing for the computation of interest to commence on 14 October 2002 is in contravention of s 69(3A). The order being a nullity also cannot stand. For the reasons aforesaid it is hereby ordered that (1) the decision of the first respondent dated 12 November 2002 be set aside; (2) the first respondent conduct a fresh inquiry into the second respondent's complaint before another labour officer; and (3) costs as prayed.

Order set aside. Matter directed to be retried before another labour officer.

Reported by Ashgar Ali Ali Mohamed